Dato' Lim Huah Leong v Engtex Marketing Sdn Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D4–29–114 OF 2000
HASNAH HASHIM J
20 OCTOBER 2014

Bankruptcy — Discharge — Application for — Application for discharge dismissed — Whether debts paid — Whether there were efforts made to pay debts — Whether statutory requirement under s 33(3) of the Bankruptcy Act 1967 fulfilled — Whether test to balance interest of public and bankrupt carried out — Whether senior assistant registrar had taken into consideration previous grounds of judgment of earlier dismissal of similar application

The appellant was declared a bankrupt on 4 September 2000. He filed his statement of affairs on 20 February 2001. The appellant had previously applied for a similar discharge in 2005 which was dismissed and had also appealed against the said decision to the High Court but withdrew the appeal. Sometime in 2008, the appellant applied for a discharge again. The application was allowed by the registrar. The creditors appealed to the High Court and the appeal was allowed. The appellant further appealed to the Court of Appeal but the appeal to the COA was however, struck off by the court. The SAR fixed the first hearing date of the appellant's application for a discharge and subsequently fixed another date for hearing with the direction that all creditors to file their respective notices of objection as well as written submissions before the aforesaid hearing date. Pursuant to the SAR's direction, the official assignee ('OA')/Director General of Insolvency ('DGI') issued a fresh notice to all creditors as required by r 194 of the Bankruptcy Rules 1969 ('BR') notifying the new hearing date. The appellant argued that the SAR ought not to have refused the application for a discharge on the basis that the appellant had not paid 50% of the debts as this was not a statutory requirement under s 33(3) of the Bankruptcy Act 1967 ('BA'); the SAR failed to apply the test to balance the interest of the public as well as that of the bankrupt in arriving at her decision; the SAR had taken into consideration the previous grounds of judgment of the earlier dismissal of a similar application; the DGI had exercised his discretion when allowing the appellant to travel and work pursuant to s 38(1)(c) of the BA; the bankrupt had made efforts to pay his debts therefore the court ought to consider this ground; the SAR failed to consider the creditors' conduct in realising the bankrupt's assets for a low value; the DGI had allowed the bankrupt to travel; there was no application to challenge the sanction to travel; and some creditors were not entitled to be heard as they had not filed their proof of debts. In objecting the appeal, the creditor argued that the appellant had not satisfied the debt amount or 50% of the total debt; the appellant did

not file his statement of affairs within the prescribed time as required under s 33(1) of the BA; the DGI report was incomplete; there were no special circumstances; there were suspicions of the appellant owning properties; the creditors were not called for public examination; public interest; and the previous application was dismissed.

Held, dismissing the appeal:

(1) Rules 194 of the BR referred specifically to s 33(B) of the BA which is a section in the Act that provides for objection by creditors of the issuance of a certificate discharging the bankrupt pursuant to s 33A BA. The application to discharge by an order of the court is made pursuant to s 33(1) of the BA. The application by the appellant was for an order of discharge by the court. Therefore, the prescribed Form 51C did not apply. Pursuant to ss 93(2) and 93(4) of the BA, the SAR fixed a new hearing date and gave directions that all creditors to file their respective notices of objections as well as written submissions before the aforesaid hearing date. The DGI had also issued a notice on 12 December 2013 to all creditors pursuant to r 194 of the BR notifying the new hearing date. The SAR did not err when she dismissed the preliminary objection raised (see paras 14–15).

(2) The receiving order and adjudicating order ('the ROAO') was granted on 4 September 2000. However, the appellant did not file his statement of affairs within the prescribed time as he said he was unaware of the bankruptcy. However, upon his application to the DGI an extension of time to file the statement of affairs was granted. Despite the extension granted, the appellant did not file his statement of affairs within the stipulated extended time and applied for a second extension. The DGI, however, allowed the second application for extension. Since an extension was granted by the DGI pursuant to s 16(2)(b) of the BA, the appellant did not commit an offence (see paras 17 & 21).

(3) Without a proper and complete report by the DGI, the court would be unable to decide on the issue of discharge. The purpose of the DGI Report was to secure a full and complete investigation and disclosure of all the material facts and/or information relating to the bankrupt particularly on issues stipulated under s 33(4) and (6) of the BA (see para 22).

(4) In an application for a discharge, each case has to depend upon its own individual circumstances. The DGI's report was very important and was an integral piece of document to assist the court in its consideration and determination whether a bankrupt should be discharge. Without a proper and complete report on all the relevant issues the court will not be able to exercise its judicial discretion. The DGI must appreciate the importance of his investigations and the report, failing which the report

would be unreliable and the application by the bankrupt for a discharge would ultimately be refused (see para 30).

(5) An individual should not remain a bankrupt and should be given an opportunity to make a fresh start. However, the court also appreciated that in bankruptcy matters, it was imperative that the DGI investigate into the reason for the bankrupt's insolvency so that the interest of the creditors and the public are protected. The DGI report did not attempt to explain how the investigation was conducted and the information of the properties that they had relied on. The DGI Report was grossly incomplete as no proper investigation was conducted (see paras 31 & 36).

[Bahasa Malaysia summary

Perayu telah diisytiharkan bankrap pada 4 September 2000. Dia telah memfailkan penyataan hal ehwal pada 20 Februari 2001. Perayu sebelum ini telah memohon pelepasan yang sama pada tahun 2005 yang telah ditolak dan juga telah merayu terhadap keputusan tersebut ke Mahkamah Tinggi tetapi telah menarik balik rayuan itu. Sekitar tahun 2008, perayu telah memohon untuk pelepasan sekali lagi. Permohonan itu telah dibenarkan oleh pendaftar. Pemiutang-pemiutang telah merayu ke Mahkamah Tinggi dan rayuan itu telah dibenarkan. Perayu selanjutnya telah merayu ke Mahkamah Rayuan tetapi rayuan ke Mahkamah Rayuan itu bagaimanapun, telah dibatalkan oleh mahkamah. Penolong Kanan Pendaftar ('PKP') telah menetapkan tarikh perbicaraan lain dengan arahan agar kesemua pemiutang-pemiutang memfailkan notis bantahan masing-masing dan juga hujah-hujah bertulis mereka sebelum tarikh perbicaraan tersebut. Berikutan arahan PKP itu, Pegawai Pemegang Harta ('PPH')/Ketua Pengarah Insolvensi ('KPI') telah mengeluarkan notis baru kepada kesemua pemiutang sepertimana dikehendaki oleh k 194 Kaedah-Kaedah Kebankrapan 1969 ('KK') yang memaklumkan tentang tarikh perbicaraan baru. Perayu berhujah bahawa PKP tidak patut menolak permohonan untuk pelepasan itu atas asas bahawa perayu tidak membayar 50% daripada hutang itu kerana ini bukan keperluan statutori di bawah s 33(3) Akta Kebankrapan 1967 ('AK'); PKP telah gagal menggunapakai ujian untuk mengimbangi kepentingan awam dan juga si bankrap dalam membuat keputusan beliau; PKP telah mempertimbangkan alasan penghakiman sebelumnya berhubung penolakan permohonan sama; KPI telah menggunakan budi bicaranya apabila membenarkan perayu berjalan dan bekerja menurut s 38(1) AK; si bankrap telah berusaha untuk membayar hutangnya oleh itu mahkamah patut mempertimbangkan alasan ini; PKP telah gagal mempertimbangkan perbuatan pemiutang dalam merealisasikan aset-aset si bankrap untuk nilai yang rendah; KPI telah membenarkan si bankrap berjalan; tiada permohonan untuk mencabar sanksi untuk berjalan; dan beberapa pemuitang tidak diberi hak untuk didengari kerana mereka tidak memfailkan bukti hutang mereka. Dalam membantah rayuan itu, pemiutang

berhujah bahawa perayu tidak membayar jumlah 50% daripada keseluruhan hutang itu; perayu tidak memfailkan penyataan urusannya dalam tempoh masa ditetapkan sepertimana dikehendaki di bawah s 33(1) AK; laporan KPI adalah tidak lengkap; tiada keadaan istimewa; terdapat syak wasangka terhadap perayu memiliki beberapa hartanah; pemiutang-pemiutang tidak dipanggil untuk pemeriksaan awam; kepentingan awam; dan permohonan sebelumnya ditolak.

Diputuskan, menolak rayuan:

(1) Kaedah 194 KK merujuk secara khusus kepada s 33(3) AK yang merupakan seksyen dalam Akta itu yang memperuntukkan bantahan oleh pemiutang-pemiutang berhubung sijil melepaskan si bankrap menurut s 33A AK. Permohonan untuk pelepasan oleh perintah mahkamah dibuat menurut s 33(1) AK. Permohonan oleh perayu adalah untuk perintah pelepasan oleh mahkamah. Oleh itu, Borang 51C yang ditetapkan tidak terpakai. Menurut ss 93(2) dan 93(4) AK, PKP telah menetapkan tarikh perbicaraan baru dan memberikan arahan bahawa kesemua pemiutang untuk memfailkan notis-notis bantahan masing-masing dan juga hujah-hujah bertulis sebelum tarikh perbicaraan tersebut. KPI juga telah mengeluarkan notis pada 12 Disember 2013 kepada kesemua pemiutang menurut k 194 KK memaklumkan tentang tarikh perbicaraan yang baru. PKP tidak terkhilaf apabila beliau menolak bantahan awal yang ditimbulkan (lihat perenggan 14–15).

(2) Perintah penerimaan dan perintah pengadilan ('PPPP') telah diberikan pada 4 September 2000. Walau bagaimanapun, perayu tidak memfailkan penyataan urusannya dalam tempoh yang ditetapkan kerana dia tidak sedar tentang kebankrapan itu. Namun begitu, setelah permohonannya kepada KPI satu lanjutan masa untuk memfailkan penyataan urusan telah diberikan. Walaupun lanjutan itu diberikan, perayu tidak memfailkan penyataan urusannya dalam tempoh lanjutan yang ditetapkan dan memohon untuk lanjutan kedua. KPI itu, bagaimanapun, membenarkan permohonan kedua untuk lanjutan. Oleh kerana lanjutan telah diberikan oleh KPI itu menurut s 16(2)(b) AK, perayu tidak melakukan kesalahan itu (lihat perenggan 17 & 21).

(3) Tanpa laporan yang teratur dan lengkap oleh KPI itu, mahkamah tidak dapat membuat keputusan tentang isu pelepasan tersebut. Tujuan laporan KPI adalah untuk memperoleh siasatan yang lengkap dan penuh dan pendedahan semua fakta dan/atau maklumat penting berkaitan si bankrap terutamanya tentang isu-isu yang ditetapkan di bawah s 33(4) dan (6) AK (lihat perenggan 22).

(4) Dalam permohonan untuk pelepasan, setiap kes bergantung kepada keadaan individunya sendiri. Laporan KPI amat penting dan merupakan

dokumen penting bagi membantu mahkamah dalam pertimbangan dan penentuannya sama ada si bankrap patut dilepaskan. Tanpa laporan yang teratur dan lengkap berhubung semua isu-isu relevan mahkamah tidak dapat melaksanakan budi bicara kehakimannya. KPI perlu memahami pentingnya siasatan dan laporannya, dan jika gagal laporan itu tidak boleh digunakan dan permohonan oleh si bankrap untuk pelepasan akan ditolak (lihat perenggan 30).

(5) Seorang individu tidak patut kekal bankrap dan patut diberi peluang untuk memulakan hidup baru. Walau bagaimanapun, mahkamah juga memahami bahawa dalam perkara kebankrapan, ia adalah wajib untuk KPI menyiasat sebab ketaksolvenan si bankrap agar kepentingan pemiutang-pemiutang dan pihak awam dilindungi. Laporan KPI tidak cuba menjelaskan bagaimana siasatan dilakukan dan maklumat tentang hartanah-hartanah yang mereka bergantung kepada. Laporan KPI tidak lengkap langsung kerana tiada siasatan teratur telah dilakukan (lihat perenggan 31 & 36).]]]]

Notes

For cases on application for, see 1 *Mallal's Digest* (5th Ed, 2015 Reissue) paras 3294–3310.

Cases referred to

Lim Hun Swee v Malaysia British Assurance Bhd (currently known as Allianz General Insurance Malaysia Bhd) & Ors (judgment creditors) [2011] 2 MLJ 218; [2010] 8 CLJ 680, CA (refd)

Public Bank Bhd v Choong Yew Wah [2014] 4 MLJ 559; [2014] 5 CLJ 695, CA (refd)

Re Lau Kah Lay & Anor; Ex P Cold Storage (M) Bhd [2001] 6 MLJ 311; [2001] 3 CLJ 960, HC (refd)

Legislation referred to

Bankruptcy Act 1967 ss 16, 16(2)(b), 16(3), 17, 33, 33(1), 33(3), 33(4), 33(8), 33A, 33B, 33B(2), 34, 38(1)(c), 72, 93(2), 93(4)

Bankruptcy Rules 1969 rr 194, 194C, 196(3), Form 51C

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Jennifer Lai (Liow & Co for Strong Mixed Concrete Sdn Bhd) for the creditors.

Kavitha (Ho Loke & Koh for Alliance Bank Malaysia Bhd) for the creditors.
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TJ Lee (Zairina Loh & Wong for United Overseas Bank (M) Bhd) for the creditors.
TJ Wong (Tuck-Jeong & Lee for Engtex Marketing Sdn Bhd) for the creditors.

Hasnah Hashim J

[1] Enclosure 240 is the bankrupt's appeal against the decision of the learned senior assistant registrar on 28 March 2014 dismissing application dated 1 November 2013 to discharge pursuant to s 33(1) of the Bankruptcy Act 1967 ('BA').

BRIEF BACKGROUND

[2] The appellant was declared a bankrupt on 4 September 2000. He filed his statement of affairs on 20 February 2001. The appellant had previously applied for a similar discharge in 2005 which was dismissed on 5 May 2006. The appellant had also appealed against the said decision to the High Court but withdrew the appeal on 27 September 2006.

[3] The appellant applied for a discharge again sometime in 2008. The said application was allowed by the learned registrar on 19 June 2009. The creditors appealed and on 7 January 2010 the High Court allowed the appeal. The appellant further appealed to the Court of Appeal ('COA'). The appeal to the COA was however, struck off by the court on 18 April 2011.

[4] On 10 December 2013 the SAR fixed the first hearing date of the appellant's application for a discharge and subsequently fixed another date for hearing ie 20 January 2014 with the direction that all creditors to file their respective notices of objection as well as written submissions before the aforesaid hearing date. Pursuant to the SAR's direction the official assignee (OA)/Director General of Insolvency (DGI) issued a fresh notice on 12 December 2013 to all creditors as required by r 194 of the Bankruptcy Rules 1969 notifying the new hearing date.

THE APPELLANT'S ARGUMENTS

(a) The SAR ought not to have refused the application for a discharge on the basis that the appellant has not paid 50% of the debts as this is not a statutory requirement under s 33(3) of the BA.

(b) The SAR failed to apply the test to balance the interest of the public as well as that of the bankrupt in arriving at her decision.

(c) The SAR had taken into consideration the previous grounds of judgment

of the earlier dismissal of a similar application.

(d) The DGI had exercised his discretion when allowing the appellant to travel and work pursuant to s 38(1)(c) of the BA.

(e) The bankrupt has made efforts to pay his debts therefore the court ought to consider this ground.

(f) The learned SAR failed to consider the creditors' conduct in realising the bankrupt's assets for a low value.

(g) The DGI had allowed the bankrupt to travel. No application to challenge the sanction to travel.

(h) Some creditors are not entitled to be heard as they have not filed their proof of debts.

CREDITORS' OBJECTIONS

(a) The appellant has not satisfied the debt amount or 50% of the total debt.

(b) The appellant did not file his statement of affairs within the prescribed time as required under s 33(1) of the BA.

(c) The DGI Report is incomplete.

(d) No special circumstances.

(e) Suspicion of the appellant owning properties.

(f) Creditors were not called for public examination.

(g) Public interest.

(h) Previous application was dismissed.

DECISION

[5] Section 33(1) of the BA provides as follows:

> A bankrupt may at any time after being adjudged bankrupt apply to the court for an order of discharge, and the court shall appoint a day for hearing the application.

[6] Upon hearing the application the court may grant or refuse an absolute order of discharge, or grant a conditional discharge. Section 33(3) of the Act provides:

> On the hearing of the application the court shall take into consideration a report of the Director General of Insolvency as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy, and may either grant or refuse an absolute order ofdischarge, or

suspend the operation order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property.

[7] For the purposes of this section the DGI Report shall be prima facie evidence of any statements made in pursuant to the application with regards to the affairs of the bankrupt (s 33(8) of the BA). It is also provided that for the purposes of s 33 of the BA '... a bankrupt's assets shall be deemed of a value equal to fifty ringgit per centum of the amount of his unsecured liabilities when the court is satisfied that the property of the bankrupt has realised or is likely to realise or with due care in realisation might have realises an amount equal to fifty ringgit per centum of the amount of his unsecured liabilities and a report by the Director General of Insolvency shall be prima facie evidence of the amount of such liabilities'.

Rules 194C and 196(3) of the Bankruptcy Rules 1969 (BR)

[8] Rule 194C of the BR provides:

Every notice of the creditor's objection to the issuance of a certificate discharging a bankrupt under section 33B(2) of the Act shall be in Form 51C.

[9] Section 33B(2) of the BA states as follows:

A creditor who has been served with a notice under subsection (1) and who wishes to object to the issuance of a certificate discharging the bankrupt shall, within twenty-one days from the date of service of the notice, furnish a notice of the objection stating the grounds of his objection.

[10] Rule 196(3) of the BR provides:

If a creditor who has proved intends to oppose the discharge of a bankrupt he shall give notice of the intended opposition stating the grounds thereof to the Official Assignee not less than three days before the hearing of the application.

[11] Rule 194C of the BR applies only if the application to discharge is made pursuant to s 33A of the BA. The aforesaid section provides for a discharge of bankrupt by a certificate by the DGI.

(1) The Director General of Insolvency may, in his discretion but subject to section 33B, issue a certificate discharging a bankrupt from bankruptcy.

(2) The Director General of Insolvency shall not issue a certificate discharging a bankrupt from bankruptcy under subsection (1) unless a period of five years has lapsed since the date the receiving order and the order by which he was adjudged bankrupt were made.

(3) Notice of every discharge under subsection (1) shall be given by the Director General of Insolvency to the Registrar and the Director General of Insolvency shall advertise the notice in a local newspaper as prescribed.

(4) The Director General of Insolvency shall, upon the application of any interested person, issue a copy of the certificate of discharge to the applicant upon payment of the prescribed fee.

[12] Rule 194C of the BR referred specifically to s 33B of the BA which is a section in the Act that provides for objection by creditors of the issuance of a certificate discharging the bankrupt pursuant to s 33A of the BA.

[13] In the instant appeal, the application to discharge by an order of the court is made pursuant to s 33(1) of the BA:

A bankrupt may at any time after being adjudged bankrupt apply to the court for an order of discharge, and the court shall appoint a day for hearing the application.

[14] The application by the appellant is for an order of discharge by the court therefore the prescribed Form 51C does not apply. Furthermore, pursuant to ss 93(2) and 93(4) of the BA the SAR fixed a new hearing date and gave directions that all creditors to file their respective notices of objections as well as written submissions before the aforesaid hearing date. The DGI had also issued a notice on 12 December 2013 to all creditors pursuant to r 194 of the Bankruptcy Rules 1969 notifying of the new hearing date.

[15] The learned SAR did not err when she dismissed the preliminary objection raised.

STATEMENT OF AFFAIRS

[16] Pursuant to s 16 of the BA, the statement of affairs must be filed by the bankrupt:

(1) Where a receiving order is made against a debtor he shall make out and submit to the Director General of Insolvency a statement of and in relation to his affairs in the prescribed form, verified by affidavit, showing the particulars of the debtor's assets, debts and liabilities, the names, residences and occupations of his creditors, the securities held by them respectively, the dates when the securities were respectively given, the cause of his insolvency, the date when he last balanced his accounts before becoming insolvent, the amount of his capital at the date of such balance, after providing for all his liabilities and making allowances for bad and doubtful debts, and such further and other information as is prescribed or as the Director General of Insolvency requires.

(2) The statement shall be so submitted within the following times:

(a) if the order is made on the petition of the debtor, within seven days from the date of the order;

(b) if the order is made on the petition of a creditor, within twenty-one days from the date of the order, but the Director General of Insolvency may in either case for special reasons extend the time by order made under his hand, to be forthwith filed, recording the reasons therefore.

(3) If the debtor fails without reasonable excuse, proof whereof shall lie on him, to comply with the requirements of this section he shall be guilty of a contempt of court and may be punished accordingly, and the court may on the application of the Director General of Insolvency or of any creditor adjudge him bankrupt.

(4) Any person stating himself, in writing, to be a creditor of the bankrupt may personally or by agent inspect this statement at all reasonable times and take any copy extract there from, but any person untruthfully so stating himself to be a creditor shall be guilty of a contempt of court and shall be punishable accordingly on the application of the Director General of Insolvency.

[17] The receiving order and adjudicating order ('the ROAO') was granted on 4 September 2000. However, the appellant did not file his statement of affairs within the prescribed time as he said he was unaware of the bankruptcy. However, upon his application to the DGI an extension of time to file the statement of affairs was granted. Despite the extension granted, the appellant did not file his statement of affairs within the stipulated extended time and applied for a second extension. The DGI, however, allowed the second application for extension.

[18] It is submitted by the learned counsel for the appellant that the SAR should not have considered the objection of some of the creditors pursuant to s 33(4) of the BA as the appellant did not commit an offence. Section 33(4) of the BA, inter alia, provides that where a bankrupt has committed any offence under the Act, the court shall either refuse the discharge or suspend the order until a dividend of not less than 50% has been paid to the creditors.

[19] Section 16(2)(b) of the BA provides as follows:

(2) The statement shall be so submitted within the following times: (a) if the order is made on the petition of the debtor, within seven days from the date of the order;

(b) if the order is made on the petition of a creditor, within twenty-one days from the date of the order, but the Director General of Insolvency may in either case for special reasons extend the time by order made under his hand, to be forthwith filed, recording the reasons therefore.

[20] Section 16(3) of the same Act provides that if the debtor fails to do so without reasonable excuse, proof of which shall lie on him, he shall be guilty of contempt of court and may be punished accordingly. The DGI may, for special reasons extend the time by order made under his hand, to be forthwith filed, and recording the reasons for such an extension.

[21] In the instant appeal since an extension was granted by the DGI pursuant to s 16(2)(b) of the BA to the appellant therefore he did not commit an offence.

THE DGI REPORT

[22] In dealing with the application for discharge, the court shall take into consideration a report of the DGI as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy. This is a mandatory requirement under the said provision. Thus, for such an application for a discharge to be considered the report of the DGI is of utmost importance. However, the court is not bound to accept it if it is satisfied that the report is incomplete and unreliable or made based on incomplete investigation into the conduct and affairs of the bankrupt. Without a proper and complete report by the DGI, the court would be unable to decide on the issue of discharge. The purpose of the DGI report is to secure a full and complete investigation and disclosure of all the material facts and/or information relating to the bankrupt particularly on issues stipulated under s 33(4) and (6) of the Act:

> (4) In all cases where it is proved to the satisfaction of the court that the bankrupt has committed any offence under this Act or under any written law repealed by this Act or under section 421, 422, 423 or 424 of the Penal Code (Act 574) the court shall unless for special reasons it otherwise determines either refuse the discharge or suspend the operation of the order until a dividend of not less than fifty per centum has been paid to the creditors, and on proof of any of the facts mentioned in subsection (6) the court shall either —
>
> (a) refuse the order; or
>
> (b) suspend the operation of the order for a specified time; or
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> (c) suspend the operation of the order until a dividend of not less than fifty per centum has been paid to the creditors; or
>
> (d) grant an order of discharge subject to such conditions as aforesaid.
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> The powers of suspending and attaching conditions to a bankrupt's discharge may be exercised concurrently.
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> (6) The facts hereinbefore referred to are —
>
> (a) that the bankrupt has omitted to keep such books of account as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy, or within such shorter period immediately preceding that event as the court deems reasonable in the circumstances;
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> (b) that the bankrupt has continued to trade after knowing or having reason to believe himself to be insolvent;

(c) that the bankrupt has contracted any debt provable in the bankruptcy without having at the time of contracting it any reasonable ground of expectation, proof whereof shall lie on him, of being able to pay it;

(d) that the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities;

(e) that the bankrupt has brought on or contributed to his bankruptcy by rash and hasardous speculations or extravagance in living, or by recklessness, or gambling or want of reasonable care and attention to his business and affairs;

(f) that the bankrupt has delayed or put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action or other legal proceedings properly brought or instituted against him;

(g) that the bankrupt has brought on or contributed to his bankruptcy by incurring unjustifiable expense in bringing any frivolous or vexatious action;

that the bankrupt has within three months preceding the date of the receiving order, when unable to pay his debts as they become due, given an undue preference to any of his creditors; (i) that the bankrupt has within three months preceding the date of the receiving order incurred liabilities with a view to making his assets equal to an amount of fifty ringgit per centum of the amount of his unsecured liabilities;

(i) ...

(j) that the bankrupt has in Malaysia or elsewhere on any previous occasion been adjudged bankrupt or made a composition or arrangement with his creditors;

(k) that the bankrupt has been guilty of any fraud or fraudulent breach of trust;

(l) that the bankrupt has within three months immediately preceding the date of the receiving order sent goods out of Malaysia under circumstances which afford reasonable grounds for believing that the transaction was not a bona fide commercial transaction;

(m) that the bankrupt's assets are not of a value equal to fifty ringgit per centum of the amount of his unsecured liabilities, unless he satisfies the court that the fact that the assets are not of a value equal to fifty ringgit per centum of his unsecured liabilities has arisen from circumstances for or in respect of which he cannot justly be held blameable.

[23] The report prepared by the DGI must be fair and unbiased for or against the bankrupt or the creditors as well as a full disclosure of the facts. Under the law, the DGI has an onerous task and is duty-bound to carry out a complete and efficient investigation. Section 72 of the BA stipulates:

As regards the debtor, the Director General of Insolvency shall:

A (a) investigate the conduct of the debtor, and report to the court stating whether there is reason to believe that the debtor has committed any act which constitutes an offence under this Act or under section 421, 422, 423 or 424 of the Penal Code or which would justify the court in refusing, suspending or qualifying an order for his discharge;

B (b) make such other reports concerning the conduct of the debtor as the court directs or as may be prescribed;

(c) take such part as may be directed by the court or prescribed in the public examination of the debtor;

C (d) take such part and give such assistance in relation to the prosecution of any fraudulent debtor or any other person charged with an offence under this Act, as the Public Prosecutor may direct.

[24] The bankrupt, in an application for a discharge, cannot be allowed to D obtain undue advantage of the weaknesses in the DGI's incomplete report. Ian Chin J in his judgment in the case of *Re Lau Kah Lay & Anor; Ex P Cold Storage (M) Bhd* [2001] 6 MLJ 311; [2001] 3 CLJ 960 said,

... the OA carries the onerous task of ensuring that a bankrupt has no hidden assets stashed away, whether in his name or in the name of his wife or children, as E otherwise people will be imbued with the message that money borrowed could be stashed away and need not be repaid and such horde can be enjoyed even when one is a bankrupt. If the office of the OA does not show itself equal to the task of preventing such rip-off of the creditor then cases of borrowers not repaying and not minding to be made bankrupt would be the rule rather than the exception. Then, F business morality would decline.

[25] The COA in the case of *Public Bank Bhd v Choong Yew Wah* [2014] 4 MLJ 559; [2014] 5 CLJ 695 held that the DGI's report plays an important part and that the court relies heavily on it to exercise its discretion. The court is G duty-bound to examine the DGI's report and determine whether the recommendation made is based on a thorough investigation of the affairs of the bankrupt and the interests of the creditors and not merely be a rubber stamp of the DGI's recommendation. If the court is of the view that the DGI's report is lacking in details or reasonable justifications, the court is duty-bound to ignore H it and cannot allow the bankrupt to take advantage of such deficiencies. Further, ss 17 and 34 of the BA empowers the DGI to carry out thorough investigation of the estate of the bankrupt and any failure to carry out such a statutory task would result in a dereliction of his statutory duty.

I **[26]** It is the submission of learned counsel for the appellant that the SAR ought not to have refused the application for a discharge on the basis that the appellant has not paid 50% of the debts as this is not a statutory requirement under s 33(3) of the BA. Section 33(3) of the BA states that the court shall take into consideration a report of the Director General of Insolvency as to the

bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy.

[27] The DGI had prepared two reports dated 2 December 2013 and 9 December 2013 for the purpose of the appellant's application to discharge. The DGI supports the application for the discharge and states as follows:

(a) Bankrap tidak melakukan kesalahan di bawah Akta Kebankrapan 1967 kerana telah memberikan komitmen serta kerjasama yang baik sepanjang tempoh pentadbiran kes kebankrapan dengan membuat bayaran ansuran bulanan secara teratur dan memfailkan Penyata Pendapatan dan Perbelanjaan setiap 6 bulan tanpa gagal.

(b) Sebab kebankrapan kerana menjadi penjamin kepada hutang syarikat G-Two Holdings Berhad yang telah digulungkan dan Pelikuidasi Yang Diluluskan telah dilantik iaitu SC Corporated Recovery Sdn Bhd (Dato' V.Shanmughanathan). G.Two Holdings Berhad digulungkan pada 13.3.2001, No.Kes Penggulungan Syarikat: D5-28-430-1998. Selanjutnya, satu Sam an Dalam Kamar bertarikh 2.3.2011 telah difailkan oleh Pelikuidasi Yang Di-luluskan untuk permohonan pembubaran syarikat G-Two Holdings Berhad. Selanjutnya pada 19.4.2011, Mahkamah telah membenarkan permohonan pelikuidasi luar untuk membubarkan syarikat G-Two Holdings Berhad di bawah Seksyen 239, Akta Syarikat 1965.

(c) Pengisytiharan dividen sebanyak 1.1% - RM934,843.96 telah dibayar kepada pemiutang-pemiutang yang diperakui tuntutan pada 4.11.2013.

(d) Bankrap tidak mempunyai apa-apa aset lagi yang boleh diambilkira dan kebanyakan pemiutang telah mendapat pembayaran masing-masing melalui jamin-gadaian yang telah diberikan.

(e) Bankrap adalah seorang yang berpotensi dalam perniagaan serta telah cuba untuk berjaya, dan dengan kebenaran KPI serta dengan syarat bagi kenaikan pembayaran bulanan, Bankrap telah berkhidmat sebagai penasihat kepada syarikat.

(f) Bankrap tidak pernah melarikan diri walaupun telah beberapa kali kebenaran untuk keluar Negara diberikan atas permohonan Bankrap.

[28] Section 33(4) of the BA, inter alia, provides that where a bankrupt has committed any offence under the Act, the court shall either refuse the discharge or suspend the order until a dividend of not less than 50% has been paid to the creditors but the DGI may for special reasons extend the time by order made under his hand, to be forthwith filed, and recording the reasons for such an extension.

[29] In the preparation of a report with regards to a bankrupt, the DGI must apply the same standard and principles to all bankrupts and treat all bankrupts

on equal footing whether the amount involved is RM50,000 or in the millions. Thorough investigation must be conducted by the DGI, if possible leaving no stones unturned.

[30] I am of the view that in considering the question of the appellant's discharge, this court is bound to have regard not only to the interest of the appellant as a bankrupt or of the creditors alone, but also to the interest of the public, and of commercial morality. In an application for a discharge, each case has to depend upon its own individual circumstances. The DGI's report is therefore very important and is an integral piece of document to assist the court in its consideration and determination whether a bankrupt should be discharge. Without a proper and complete report on all the relevant issues the court will not be able to exercise its judicial discretion. The DGI must appreciate the importance of his investigations and the report, failing which the report would be unreliable and the application by the bankrupt for a discharge would ultimately be refused. Ramly JCA (as he then was) said in *Lim Hun Swee v Malaysia British Assurance Bhd (currently known as Allianz General Insurance Malaysia Bhd) & Ors (judgment creditors)* [2011] 2 MLJ 218; [2010] 8 CLJ 680,

> The public as well as commercial players should not be imbued with the perception that a person can easily borrow money (even in big amount) from financial institutions or create debts with other business creditors, then stash the money away, whether in his own name or any other persons and need not be repaid; then personally apply for a bankruptcy order against him (as in the present case) and after a short period apply for an order for a discharge with a minimum or too little dividend to be paid to the creditors, and after the discharge he can enjoy a luxury life. If this practice and perception is not checked, then commercial morality would decline. In this type of fiasco, the court and the DGI should be blamed for not carrying out their duties effectively under the bankruptcy law.

[31] I agree with the submission of learned counsel for the appellant that an individual should not remain a bankrupt and should be given an opportunity to make a fresh start. However, the court also appreciates that in bankruptcy matters, it is imperative that the DGI investigate into the reason for the bankrupt's insolvency so that the interest of the creditors and the public are protected.

[32] It is only in deserving cases that a bankrupt may be discharged from his bankruptcy, but not at the expense of commercial morality and public perception on bankruptcy law in the country. In allowing a discharge, the court must be very cautious in balancing between the interest of the bankrupt as an individual and the interest of the public and commercial reality at large. The application for a discharge can easily be abused especially in cases where the DGI has failed to carry out proper and complete investigation into the affairs

of the bankrupt. It is essential that there must be full and frank disclosure of all the relevant and material facts in the DGI's report.

[33] In the instant appeal, the appellant is 61 years old and currently working as a company advisor with a monthly income of RM15,000. He is married with six children between the ages of 13 to 35 years old. It is also stated in the DGI Report that the appellant had diligently paid all the monthly installments. RM300 per month from February 2001 and in May 2001 it was increased to RM500. Subsequently, it was increased to RM2,000 commencing on 1 June 2001. On 1 August 2002 it was increased to RM3,000 and from 1 May 2004 it was increased to RM3500. In 2011 commencing from May 2011 it was increased to RM5,000. The total amount paid by the bankrupt is RM991,487.61 by 242 monthly installments.

[34] Learned counsel for the appellant also argued that the learned SAR failed to consider the creditors' conduct in realising the bankrupt's assets for a low value in realising his securities. However, in the DGI report this was not even mentioned at all. No evidence or proof that the securities or assets were realised at very low prices. The DGI report merely states (p 23) that the appellant had disclosed in his statement of affairs that he does not own any asset. The appellant was the beneficial owner of a property which was sold for RM2,550,000 and paid directly by the purchaser to the bank. RM150,000 was paid to the DGI and credited into the bankrupt's estate. The DGI did not give any explanation or reason why only RM150,000 was paid into the appellant's estate.

[35] Despite being in the state of bankruptcy the DGI had also granted to the appellant a total of 19 sanctions to travel abroad, from time to time, from 2001 until October 2013. The DGI report did not even explain the reasons the appellant had to travel overseas. Was it for medical purposes? Was it for business purposes? He had travelled to Europe, United States, Australia, Japan, South Africa, China, and India, etc.

[36] It is also stated in the DGI report that the 'Bankrap disyaki memiliki beberapa hartanah ...'. However, upon conducting a search the properties were not registered in the name of the appellant. The DGI report did not attempt to explain how the investigation was conducted and the information of the properties that they had relied on. I am of the considered view that the DGI report is grossly incomplete as no proper investigation was conducted.

[37] A dividend of 1.1% to be paid to the creditors was declared. I am of the view, taking into consideration the total amount of debt, the dividend of 1.1% as declared is grossly insufficient. From the contents of the DGI report, it is apparent therefore that the dividend declared is clearly insufficient and not a

reasonable or fair amount to cover the debt incurred by the bankrupt. Based on the DGI report the bankrupt's total liability amounts to RM141,162,257.27, the admitted debt is RM97,729,073 and the estate of the bankrupt has a credit balance of RM991,487.61. An order for a discharge should not be granted without proper and complete investigation into the affairs of the bankrupt by the DGI.

[38] In my view, to allow the discharge of a bankrupt on these terms will make a mockery of the right to bankruptcy proceedings available to creditors.

[39] For all the above reasons, the appeal ought to be and is now dismissed with costs, and the senior assistant registrar's order dismissing the application for discharge as a bankrupt is affirmed.

Appeal dismissed

Reported by Afiq Mohamad Noor